In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1184

BERNARD MCGARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A jury in the District of Massachusetts convicted petitioner on all three counts of an indictment charging him with willful attempts to evade his income taxes for the years 1959, 1960 and 1961, in violation of Section 7201 of the Internal Revenue Code, 26 U.S.C. 7201 (R. 10, 13–14, 358). Concurrent sentences of five years' imprisonment together with cumulative fines of $10,000 were imposed on each count (R. 11–12, 358–359). The Court of Appeals for the First Circuit affirmed (Pet. App. 3a–23a).

The government used the net-worth and expenditures method to prove that petitioner's returns understated his taxable income by $38,897, $6,965 and $30,868 in 1959, 1960 and 1961, as well as by a total

297-211—68

of over $100,000 during the immediately preceding four years (R. 225–231, 383–389). Petitioner's defense was that his father, since deceased, had given him $300,000 in $100 bills during the summer of 1950 (R. 262–267). The government's evidence showed, however, that when petitioner's returns for the 1946–1951 period were audited in 1952, he submitted a sworn net-worth statement which listed only $18,000 cash on hand as of December 31, 1951 (R. 81–84, 92, 363); that as a result of that audit, petitioner paid additional taxes, interest and fraud penalties of over $5,200 (R. 92–95, 677o–677p); that a further net-worth statement was submitted by petitioner in 1955, in connection with an audit of his 1952–1954 returns, in which he claimed to have only $6,000 cash on hand as of December 31, 1954 (R. 101–103, 364); and that although petitioner had been long aware of the fact that his 1959–1961 returns were under investigation (Pet. 10–12; Pet App. 24a–53a), neither he nor his brother, who at trial provided the principal testimony of the alleged $300,000 "cash hoard" and before then acted as petitioner's attorney in dealing with the Internal Revenue Service, ever mentioned the claimed $300,000 gift at any time before trial (R. 940–943). No gift tax return was ever filed on the $300,000 (R. 95, 317, 944, 960), and the financial history of petitioner's father from 1940 until his death in 1951 indicated that he could never have amassed $300,000 (R. 86–87, 393–396, 686–688, 695–696, 779–780, 893–894).

The decision of the court below was correct. There is no conflict of decisions, and no matter of general importance justifying further review.

1. On March 6, 1967, immediately after the jury had been impaneled, the prosecutors informed the court at a bench conference that, in the first week of January 1967, the Department of Justice had discovered that a wire tap on the telephone of an individual residing in Miami, Florida, had picked up two conversations to which petitioner was a party in the summer of 1963 (R. 8, 43–48, 342–343). This record does not contain the slightest suggestion that the delay in disclosure was intended to surprise or disadvantage the defense. Perhaps, with the benefit of hindsight, it might have been preferable for the disclosure to have been made earlier. The record shows nonetheless that petitioner had adequate opportunity to show that the tapped conversations resulted in the use of tainted evidence at the trial (Pet. 2–3, 4–10, 17–20).

After the disclosure there was a hearing in the absence of the jury[1] at which Yung, the Internal Revenue official who had installed the tap and examined the recordings, testified (R. 48–52) and was cross-examined at length by petitioner's counsel (R. 52–73). Defense counsel asked that Yung be held under subpoena for further *voir dire* at a later date after the defense had been able to obtain further information (R. 45–57, 71–73). The court refused to continue the existing subpoena (R. 72), but said that Yung could

[1] The timing of the disclosure cannot be said to have broken "the continuity of the jury's attention" (Pet. 16), for the jury had heard neither opening statements nor evidence.

be recalled and another *voir dire* held, "if you think it is relevant" (R. 47, 71–73). No such request was ever made.

The prosecutor furnished the names of Internal Revenue personnel who had been active in the investigation of the case (R. 45), but petitioner never sought to have them testify on his motion to suppress; and when some of them testified at trial, they were not examined as to whether they had derived information from a tainted source. Throughout the trial, not a single item of evidence was challenged on the ground of taint. Indeed, agent Yung's testimony on *voir dire*[2] was that the intercepted conversations related to petitioner's then future plans for his gambling activities, a subject that was without the remotest bearing on the income-tax questions litigated here.

Petitioner's counsel did ask several times that the individual who removed the recordings from the taps and forwarded them to Yung be produced, but the trial judge refused on the ground that the individual was a confidential informant within the rule of *McCray* v. *Illinois,* 386 U.S. 300 (R. 10, 67–69, 231–

[2] The substance of Yung's testimony was that a tap was placed on the phone of an individual in Miami, Florida, from August 1962 to August 1963 (R. 48–49, 61); that the two intercepted conversations occurred in July or August 1963, and concerned petitioner's future gambling business (R. 49–50, 61); that the tapes were erased and no written record made of the conversations (R. 50–51); and that the occurrence of the interceptions was never disclosed to anyone by Yung until his superiors gave him a list of 153 names (of which petitioner's was one) in January 1967, and asked whether he had ever heard any of them on this particular tapped line (R. 50–51, 55–56).

233, 342, 357–358). Petitioner's present argument (Pet. 9–10, 18, 19) is that the person was a paid government employee rather than a confidential informant.

It is clear from the very Subcommittee Hearings upon which petitioner relies that the person was not a regular government employee but was a confidential informant, paid from special funds, whose identity the government was privileged to protect. The testimony of the hearings establishes that the informant provided the government with information about persons whose conversations were overheard, had acted as an informant on occasions not connected with the wiretap, and would be endangered by disclosure of his name.[3]

Petitioner, moreover, nowhere describes any prejudice that he claims as the result of not having the informant's name. The only possibility—speculative at best[4]—is that the informant may have had a copy of the index to the monitored conversations that Yung had disposed of. But there were alternative means of securing such material, if it existed, as by asking

[3] See Hearings on S. 928, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., Part 2, April 4, 1967, pp. 141–144, 151, 157.

[4] That speculation (Pet. 9) is based on the testimony Yung gave when asked whether the informant retained a log: "Not that I know of. * * * Not so far as I know." See Hearings on S. 928, *supra*, at p. 152. See also *id.* at p. 141, where Yung, when asked whether the informant kept any of the tapes, said, "It would not be to his advantage to keep one." The trial court expressly found (R. 358) that there was no conflict between Yung's testimony before the Senate Subcommittee and his testimony at trial here.

the court to direct the government to inquire into its existence—but petitioner did no more than persist in his demands for disclosure of the informant's identity.

These factors, together with the limited nature of the overhearing of petitioner, show that neither the delay in disclosure nor the refusal to identify the informant was prejudicial.

2. Nothing in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, or in any other authority suggests, as petitioner urges (Pet. 3, 10–12, 20–22), that the government, having once illegally seized documents, may not thereafter obtain them legally and use them as evidence in a criminal case if it does not have independent evidence of the actual facts contained in the documents. Here the government had untainted knowledge of the location and existence of the documents before first obtaining them, and had indeed prepared a subpoena for their production (Pet. 21). Therefore, so long as lawful process was later used to obtain the materials, as is now conceded to have occurred (Pet. 20), their use was proper. *Nardone* v. *United States,* 308 U.S. 338, 341; *Wong Sun* v. *United States,* 371 U.S. 471, 487–488, 491; *Wagman* v. *Arnold,* 257 F. 2d 272, 276 (C.A. 2); *United States* v. *Sheba Bracelets, Inc.,* 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904; *United States* v. *Avila,* 227 F. Supp. 3, 6 (N.D. Cal.); cf. *United States* v. *Wallace Co.,* 336 U.S. 793. The question, moreover, has been previously litigated to final judgment between peti-

tioner and the government in *McGarry's Inc., et al.*[5] v. *Rose,* 344 F. 2d 416 (Pet. App. 30a–36a), and is no longer open. *Yates* v. *United States,* 354 U.S. 298, 335–338; *Steele* v. *United States* No. 2, 267 U.S. 505, 507; *Commissioner* v. *Sunnen,* 333 U.S. 591, 597, 601.

3. Nor did the district court err (see Pet. 3, 12–14, 22–24) in excluding petitioner's net-worth summary chart and the testimony of his expert witness. The government's net worth computation had credited petitioner with $6,000 cash on hand at the starting point, December 31, 1954 (R. 383, 471), based on petitioner's earlier admission to that effect (*supra,* p. 2). Petitioner's expert and the proffered net worth summary, relying on the testimony of the $300,000 gift in 1950, claimed cash on hand in the amount of $288,000 as of the starting point (R. 270–274, 391). But there was no evidence whatever that petitioner had $288,000 on hand in the form of cash as of December 31, 1954 (R. 274),[6] and the trial court was, therefore, correct in excluding the proffered testimony and chart.[7] *Oertle* v. *United States,* 370 F. 2d 719, 727–728 (C.A. 10), certiorari denied, 387 U.S. 943; *Bern-*

[5] Petitioner was one of appellants in that case. See also *McGarry* v. *Riley,* 363 F. 2d 421, 424 (C.A. 1), certiorari denied, 385 U.S. 969.

[6] Petitioner urges (Pet. 23) that the expenditures shown in his 1950–1954 net worth statements support the $288,000 figure. But petitioner himself admits (Pet. 12, R. 236) that the earlier statements completely omitted the alleged $300,000 gift.

[7] Moreover, as the court below noted (Pet. App. 12a–13a, 23a), petitioner was permitted to argue concerning the effect of the $300,000 gift, if believed, upon the government's net worth computation, and the jury necessarily rejected those arguments.

stein v. *United States*, 234 F. 2d 475, 483 (C.A. 5), certiorari denied, 352 U.S. 915; *United States* v. *Costello*, 221 F. 2d 668, 673–674 (C.A. 2), affirmed, 350 U.S. 359; *Clark* v. *United States*, 211 F. 2d 100, 105 (C.A. 8), certiorari denied, 348 U.S. 911.

We respectfully submit that the petition should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

APRIL 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968